THE ONTARIO HUMAN RIGHTS CODE,

S.O. 1981, Chapter 53, as amended

IN THE MATTER OF the complaint made by Tracy Lampman dated July 4, 1989 alleging discrimination in employment on the basis of harassment and sexual solicitation by Photoflair Ltd. and Mr. Roy Smith.

A HEARING BEFORE: Professor John D. McCamus

Appointed a Board of Inquiry into the above matter by the Minister of Citizenship, the Hon. Elaine Ziemba, to hear and decide the above-mentioned complaint.

Appearances:

Kaye Joachim	Counsel to the Ontario Human Rights Commission
Lauren Bates	Co-Counsel to the Ontario Human Rights Commission
Tracy Lampman	Complainant
Roy Smith	Respondent and President of the respondent Photoflair Ltd.

TABLE OF CONTENTS

I. Introduction

This proceeding is an inquiry under the Ontario Human Rights Code, 1981, S.O. 1981, c.53, as amended (the "Code") arising from a Complaint made by Ms. Tracy Lampman alleging discrimination in employment on the basis of harassment and sexual solicitation by Photoflair Ltd. and Mr. Roy Smith. The respondent Smith is the President and owner of the respondent corporation. Photoflair Ltd. operates a small photographic studio and film processing business in Burlington, Ontario. Ms. Lampman began working at Photoflair Ltd. in January of 1988 as a Laboratory Assistant. In the Complaint, Ms. Lampman alleges that Mr. Smith engaged in a number of acts constituting sexual harassment over the next several months and that, as a result, she terminated her employment at Photoflair Ltd. in February of 1989.

In his defence, the respondent Smith, who represented himself and Photoflair Ltd. in these proceedings, denied that some of the alleged incidents occurred. With respect to other incidents, it was Mr. Smith's submission either that the incident did not occur as described by Ms. Lampman in her evidence or that, when placed in context, the incidents did not constitute sexual harassment.

In addition, and as a preliminary matter, Mr. Smith argued that the Complaint should be dismissed on the basis that he had been severely prejudiced by the period of delay which arose between

the initial investigation of the Complaint and the appointment of a Board of Inquiry to conduct this proceeding. The Complaint was filed by Ms. Lampman with the Ontario Human Rights Commission (the "Commission") on July 4, 1989. Mr. Smith alleged in his submissions that the Commission led him to believe that the Commission would conduct an investigation and prepare a report within six months, following which, if no settlement was achieved, the Commission would recommend within a further six months that a Board of Inquiry be appointed. Further, Mr. Smith stated that the investigation took place in October, of 1989, that he subsequently turned down a settlement offer and, when six months passed, he assumed the matter was over and done with and proceeded to destroy his notes. Mr. Smith claimed that he was therefore surprised when he received a Report concerning the investigation from the Commission together with a letter dated September 28, 1990. On this basis, Mr. Smith urged that he had been prejudiced by the delay up to that point in time. He further alleged that he was prejudiced by the delay which then followed until the appointment of this Board of Inquiry by the Minister of Citizenship on July 18th, 1991. By this time, according to Mr. Smith, certain key witnesses were no longer available to him. Others would suffer from faded memory. He would therefore have considerable difficulty proving the facts necessary to his defence relating to incidents that had occurred two and one-half to three years before.

On these alleged facts concerning prejudice, Mr. Smith argued

that he should be entitled to rely on what he referred to as the "Askov" decision, this being the decision of the Supreme Court of Canada in R. v. Askov (1990) 74 D.L.R. (4th) 355 (S.C.C.), in which the Court held that section 11(b) of the Canadian Charter of Rights and Freedoms requires that individuals charged with a criminal offence are entitled to a trial within a reasonable period of time and that reasonable delay in the particular circumstances of that case would be no more than six to eight months between committal and trial.

Counsel for the Commission indicated that she would respond to this preliminary objection by Mr. Smith on two grounds. First, she would argue that the facts concerning the contact between the Commission and Mr. Smith during the period from the filing of the Complaint until the appointing of a Board of Inquiry were rather more extensive and complicated than Mr. Smith had indicated. Secondly, it would be argued that Mr. Smith had not in fact suffered the kind of prejudice that would be necessary to provide a legal foundation for dismissing the Complaint at the beginning of this proceeding. Sensitive to the difficulty confronted by Mr. Smith, as a non-lawyer, in making his preliminary objection, Counsel for the Commission had made available to Mr. Smith copies of twenty-five pertinent authorities prior to the hearing. As well, Counsel helpfully and carefully explored the various arguments that might be made on the basis of those authorities on Mr. Smith's behalf. In addition, of course, Counsel for the

Commission introduced evidence concerning activities during the period between filing of the Complaint and appointment of this Board of Inquiry and provided her responses to the arguments that she indicated might be made on behalf of Mr. Smith. After Mr. Smith replied to these submissions, the hearing was adjourned and I indicated that I would rule on Mr. Smith's preliminary objection at the commencement of the next hearing day. Upon reconvening, I indicated that it was my conclusion that Mr. Smith's preliminary objection should be dismissed and that I would indicate my reasons for this conclusion in the final decision concerning this matter. Those reasons are set out in the next section of this decision.

II. Ruling on Preliminary Objection

As Counsel for the Commission indicated in her submissions, there appear to be three possible legal foundations for the preliminary objection made by Mr. Smith concerning delay. First, and this is the argument put forward by Mr. Smith himself, an attempt might be made to apply the principle set forth in the Askov case, referred to above, to proceedings under the Code. That is to say, it might be argued that section 11(b) of the Canadian Charter of Rights and Freedoms, which provides that "a person charged with an offence has a right to be tried within a reasonable time", applies to such proceedings.

Secondly, it could be argued that section 7 of the Charter which provides that "everyone has the right to life, liberty and

security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" also applies to proceedings under the Code and that unreasonable delay violates this Charter protection. Two decisions of Saskatchewan courts have suggested that unreasonable delay in equivalent proceedings in that province violated the Charter's protection of "security of the person" and, because of the delay, the violation was not saved by a procedure which was in "accordance with the principles of fundamental justice".

Thirdly, Counsel for the Commission suggested that Mr. Smith might rely on an argument to the effect that a Board of Inquiry appointed under the Code possesses a discretion to dismiss a complaint or terminate a proceeding in a case where the Board is persuaded that the respondent has been the victim of an unreasonable amount of delay. Counsel suggested that the appropriate statutory basis for this power is to be found in section 23(1) of the Statutory Powers Procedure Act R.S.O. 1990, c. S-22, which stipulates as follows:

> 23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

Counsel for the Commission concedes that unreasonable delay prior to the appointment of a Board of Inquiry could constitute such an abuse.

Each of these possible foundations for Mr. Smith's preliminary

objection must be considered. The first of the three however, requires only brief consideration. The first suggestion to the effect that the section 11 Charter requirement of a speedy trial applies to proceedings under the Code finds virtually no support in the section 11 jurisprudence. Courts and tribunals of various kinds have consistently held that the section 11 protection applies to criminal rather than civil proceedings. Further, it is well established that proceedings, such as the present, which are conducted under section 35 of the Code constitute "civil proceedings" in the requisite sense rather than criminal proceedings. It is true, of course, that the Code also establishes an offence in section 43 and it is therefore an interesting question whether the Askov decision might properly be considered to apply to quasi-criminal proceedings under section 43 of the Code. That, however, is not at issue in the present context as the current proceeding is brought pursuant to section 35 and does not involve the laying of such charges. Support for the foregoing propositions, which I take to be well-established, was drawn by Counsel for the Commission from the following decisions, among others: MacBain v. Canadian Human Rights Commission (1984), 11 D.L.R. (4th) 202 (F.C.T.D.), rev'd on other grounds (1985), 22 D.L.R. (4th) 119 (Fed. C.A.); Kodellas v. Saskatchewan Human Rights Commission (1987), 8 C.H.R.R. D/3712 (Sask. Q.B.); Quereschi v. Central High School of Commerce (1988), 9 C.H.R.R. D/4527 (Ont. Bd. Inq.); Shepherd v. Bama Artisans Inc. (1988), 9 C.H.R.R. D/5049 (Ont. Bd. Inq.); Gohm v. Domtar Inc. (1989) 10 C.H.R.R. D/5968

(Ont. Bd. Inq.).

The second possible foundation for Mr. Smith's objection - the argument that section 7 of the Charter is violated by unreasonable delay - does enjoy some support in the jurisprudence. As Counsel for the Commission noted, there are two decisions of Saskatchewan courts that adopt the view that unreasonable delay in a human rights investigation could constitute an infringement of the section 7 protection of "security of the person". In Kodellas v. Saskatchewan Human Rights Commission (1989), 10 C.H.R.R. D/6305, the Saskatchewan Court of Appeal held that a four year delay from the filing of complaints of sexual harassment against the respondents in 1982 until the scheduling of a hearing in 1986 constituted a violation of section 7 of the Charter. The leisurely pace of the investigation was to be explained, in the Court's view, by the fact that the province had not made sufficient resources available for the investigative activities of the Commission. Nonetheless, the Respondent's Charter right to "security of the person" was violated by so long a passage of time. In reaching this conclusion, the Court placed considerable reliance on the articulation of the section 7 interest offered by the Supreme Court of Canada in Mills v. R., [1986] 1 S.C.R. 863 at pages 19 and 20 where Lamer, J. stated as follows:

> "... the concept of security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation". ... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including

> possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. These forms of prejudice cannot be disregarded nor minimized when assessing the reasonableness of a delay."

The Court of Appeal went on to observe that the allegations in Kodellas itself involved sexual harassment and sexual assault. The Court reasoned that if criminal charges had been brought arising from this conduct, the Mills analysis of section 7 would clearly apply. In the Court's view, no clear distinction could be drawn between criminal prosecution and quasi-criminal prosecution under the provisions of the Saskatchewan Human Rights Code. Once having reached that conclusion, the Court went on to state that no distinction could or should be drawn between quasi-criminal proceedings under the Code and civil proceedings under the Saskatchewan Code (which are parallel in nature to the present proceedings under the Ontario Code).

Having thus concluded that the individual's interest in "security of the person" was infringed by an investigation into allegations of sexual harassment and sexual assault, the Court was obliged to consider whether, in the language of section 7, the conduct of the investigation had infringed "the right not to be deprived thereof except in accordance with the principles of fundamental justice." While the Court was of the view that the normal procedures followed in an investigation of a complaint under the Code would be "in accordance with the principles of fundamental justice", this would not be so where an unreasonable delay had occurred.

In determining whether or not such delay as had occurred would be considered unacceptable for the purposes of the section 7 analysis, the Court indicated that a number of factors should be considered. First, one should consider whether the length of the delay is prima facie unreasonable. Secondly, one should consider the reason or responsibility for the delay, having regard to the conduct of the parties. Thirdly, one should consider the extent to which the respondent has suffered prejudice or impairment as a result of the delay.

Applying these considerations in the context of the facts of the Kodellas case, the Court was of the view, firstly, that the delay of almost four years was indeed prima facie unreasonable; secondly, that the Human Rights Commission itself bore the sole responsibility for the delay and thirdly, that Mr. Kodellas had suffered two forms of prejudice. With respect to the latter point, the Court concluded that he had been prejudiced by being subjected to a longer period of stigmatization and trauma than would otherwise have occurred. Secondly, Mr. Kodellas' chances of a fair hearing had been substantially reduced by his increased inability to locate helpful witnesses.

On this basis, then, the Court concluded that Mr. Kodellas had been deprived of his "security of the person" in a manner which did not accord with "the principles of fundamental justice". A

majority of the Court held that the appropriate remedy for this violation was an order staying the proceedings. Chief Justice Bayda dissented on this point and indicated his preference for a remedy which would be less devastating to the interests of the community and the complainants in ensuring the availability of redress for the type of misconduct allegedly engaged in by Mr. Kodellas.

Reference may usefully be made to two further points that are addressed in the Kodellas decision and confirmed in subsequent Saskatchewan decisions. First, the Court was of the view that the section 7 analysis was particularly applicable to allegations of sexual harassment of the kind made in Kodellas. This point was confirmed in the later decision in Saskatchewan Transportation Co. v. Lyall McDougall (1989), 10 C.H.R.R. D/5874 (Sask Q.B.). In that case, the court relied on Kodellas in holding that the section 7 analysis was not applicable to a complaint alleging that an employer practice of requiring applicants for the position of bus driver have a certain level of visual ability amounted to a discriminating practice. Such an allegation, it was held, did not subject the respondent to the kind of stigmatization, stress and anxiety that result from a sexual harassment complaint.

The other point in Kodellas creates a distinction between personal and corporate respondents. It was the Court's view that a section 7 analysis could be available only to a personal

respondent and not to a corporation as corporations do not enjoy a right of "security of the person". Thus, in Kodellas, the proceeding against Mr. Kodellas would be stayed but the proceeding could continue against the corporation through which he carried on business. This proposition was applied in the later decision in Douglas v. Saskatchewan Human Rights Commission (1990), 11 C.H.R.R. D/240 (Sask. Q.B.).

In the present case, Counsel for the Commission has urged that these Saskatchewan authorities not be considered applicable for a variety of reasons. First, it was suggested that the Saskatchewan authorities are not binding on an Ontario Board of Inquiry and therefore need not be followed. Secondly, a variety of criticisms were made of these decisions. It was suggested that the distinction between some kinds of human rights cases which give rise to stress and anxiety of a kind cognisable by section 7 and other cases which do not is untenable. Perhaps most of the various types of human rights complaints that may be brought will generate some stress for respondents. It is difficult to generalize about the amount of stress caused by a particular type of complaint. And, it may be asked, if one can so generalize, how much stress is enough to engage section 7? It may be added that there are many kinds of civil actions which similarly may give rise to stress and anxiety. It would be surprising indeed if limitations statutes and other statutory rules permitting delay in launching or prosecuting such proceedings were found to constitute violations of the

Charter.

Secondly, it was suggested that the requirement of demonstrating prejudice leads to an unattractive exercise in line drawing. How much difficulty in locating witnesses is enough to give rise to prejudice in the requisite sense? How much delay is prejudicial? It might be argued that even reasonably short periods of delay constitute prejudice in the form of increased anxiety.

Finally, it may be asked whether the distinction between personal and corporate respondents does not undermine the purpose pursued by the Saskatchewan Court of Appeal in applying section 7 to this fact situation. If, as seems inescapable, it must be held that the proceedings can continue against the respondent corporation, the victory of Mr. Kodellas may seem illusory. Especially in the case of a small business, it seems very likely that a continuation of the proceeding against the corporate entity would give rise to that very stigmatization, anxiety and stress that the Court sought to ameliorate. In the typical case, then, dismissal of the complaint against the personal respondent may not accomplish the objective identified by the Court of Appeal.

Though there does appear, in my view, to be considerable force in these criticisms of the Kodellas line of authority, it is also my view that it is unnecessary, for the purposes of the present case, to reach a definitive conclusion as to whether or not the

Kodellas analysis should be considered applicable to proceedings under the Ontario Code. Even if one accepts the applicability of that analysis, Mr. Smith must establish, in my view, the existence of substantial prejudice resulting from the alleged delay. As will be seen, it is my view that Mr. Smith has not successfully established a claim that such prejudice has occurred in the present case.

The third foundation for Mr. Smith's preliminary objection also raises legal issues of some complexity. Quite apart from possible infringements of the Charter, it may be asked what legal foundation might exist for a decision of a Board of Inquiry to "dismiss" a complaint or abandon its inquiry in response to a complaint by the respondent that too much time has passed between the filing of the complaint and the establishment of the Board of Inquiry. Again, it is my view that a definitive analysis of this issue is not required for present purposes. Mr. Smith's motion founders on this third argument as well on the basis of his inability to demonstrate that substantial prejudice has resulted from undue delay on the part of the Commission in its investigation or the Minister in appointing this Board of Inquiry. For present purposes, then, it is sufficient to make brief reference to the legal issues upon which this third basis for Mr. Smith's motion rests.

As has been indicated, Counsel for the Commission suggested

that section 23(1) of the Statutory Powers Procedure Act, in enabling tribunals to make such orders as they consider necessary to prevent abuse of their processes, provides a statutory foundation for a decision by a Board of Inquiry established under the Code to dismiss a complaint because of undue delay in its investigation or in the establishment of a Board of Inquiry. A suggestion to the same effect was made by an Ontario Board of Inquiry in Qureshi v. Central High School of Commerce (1988), 9 C.H.R.R. D/4527. It is not obvious to me, however, that undue delay by the Commission or the Minister in appointing a Board of Inquiry can be said to be an abuse of the processes of that very Board of Inquiry. Such delay or unreasonable behaviour has occurred prior to the very establishment of the Board of Inquiry. It may therefore appear to be a rather strained interpretation of section 23(1) to suggest that such delay or behaviour constitutes an abuse of the Board's "processes". No doubt, to the extent that either the Commission or the Minister has abusively exercised their statutory powers or duties to recommend or to establish a Board of Inquiry, such abuse may be subject to an application for judicial review under the Judicial Review Procedure Act. It is not abundantly clear, however, that a Board of Inquiry appointed under the Code by a Minister on the advice of a Commission which cannot fail to be aware of the amount of time that has elapsed between the date of the filing of the complaint and its recommendation that a Board of Inquiry be appointed should engage in a similar review of the exercise of these statutory powers.

On the other hand, if respondents who have suffered prejudice as a result of unreasonable delay are left exclusively to the remedy of judicial review, they may find that it offers cold, or, at the very least, rather expensive comfort. Accordingly, it is unsurprising that Boards of Inquiry appointed under the Ontario Code have inclined to the view that they possess a power to dismiss complaints on the basis of unreasonable delay prior to their own establishment. At the same time, Boards of Inquiry have taken the view that such a discretion should only be sparingly exercised inasmuch as it involves depriving complainants, who typically will not have caused the delay, of their remedies under the Code. See, for example, Hyman v. Southam Murray Printing Limited (1982), 3 C.H.R.R. D/617; McMinn v. Sault St. Marie Professional Fire Fighters Assoc. (1986), 7 C.H.R.R. D/3458; Quereshi, supra; Shepherd v. Bama Artisans Inc., supra; Gohm v. Domtar Inc., supra; Ontario Human Rights Commission v. Vogue Shoes (1991), 14 C.H.R.R. D/425.

It may well be that the proper foundation for the exercise of such a discretion is the general duty of fairness under which Boards of Inquiry, like other bodies exercising statutory powers, must operate. If the passage of time, for example, has made it impossible for the respondent to mount a defence, it may well be that continuing an inquiry in such circumstances will constitute a breach of the duty of fairness. Assuming this to be so, however,

it is not at all clear that a duty of fairness would require a Board of Inquiry to discontinue proceedings on the basis of a preliminary motion to this effect. It might well be appropriate and "fair" for the Board of Inquiry to hear some or all of the available evidence before concluding that as a result of the prejudice suffered by the respondent, it would be unfair to make certain findings or award certain remedies to the complainant.

For purposes of the present case, however, Counsel for the Commission is prepared to assume, as I therefore am, that Boards of Inquiry do possess a discretion to, in effect, "dismiss" complaints on the basis of unreasonable delay in the investigation of the complaint or the appointment of a Board and further, that such a discretion would be exercised in favour of respondents in cases where either (a) the passage of time has made it impossible for the Board to carry out its task of ascertaining whether certain facts occurred or, (b) the passage of time has so prejudiced the respondent that conducting the Inquiry would constitute an "abuse of process". Against this background, then, it is necessary to consider the evidence concerning the chronology of the investigation of the present complaint and the appointment of this Board of Inquiry.

Ms. Lampman's Complaint was filed on August 7th, 1989. On August 17th, the file was assigned to an investigator. On August 31st, 1989 a certified letter was sent by the Commission to Mr.

Smith enclosing a copy of the Complaint and requesting him to complete an attached questionnaire and submit appropriate documents by September 21st, 1989. Mr. Smith's reply (Exhibit 2) was received by the Commission on September 28th, 1989. A few weeks later, Mr. Smith's reply was sent to the Complainant and over the next few weeks there were a number of conversations with and, in mid-November, a meeting with the Complainant. On December 11th, 1989, a letter (Exhibit 3B) was sent by the investigating officer to Mr. Smith indicating that such a meeting had occurred and that the investigation would continue. The letter further indicated that the author would like to meet with all of the employees of Photoflair and would like to review their personnel files. Further, the letter indicated that the Complainant was willing to settle the matter on certain terms and conditions.

On February 9, 1990, the investigating officer attended at the premises of Photoflair for the purpose of continuing the investigation and conducting interviews with certain employees. Mr. Smith initially resisted responding to a request for the names of former employees but ultimately determined to provide such information and did provide it on March 2nd, 1990. On April 2nd, 1990 a further letter was sent by the Commission to Mr. Smith indicating the nature of a settlement proposal put forward by Ms. Lampman. The letter further indicated that if no settlement were to be achieved, the next step would be to recommend establishment of a Board of Inquiry. The letter requested original documentation

of various matters and the author requested Mr. Smith to contact her by April 20, 1990. On September 28, 1990, the Commission forwarded to Mr. Smith the investigative report concerning the Complaint. That letter indicated that the report would form the basis on which the Commission would decide whether or not to recommend the establishment of a Board of Inquiry. Mr. Smith was invited to reply to the report by October 29, 1990. Such a reply was forwarded by Mr. Smith on October 23, 1990. It was received at the Commission on November 1, 1990. Approximately six and a half months later, on May 9, 1991, the Chief Commissioner wrote to Mr. Smith and indicated to him that the Commission had requested the Minister of Citizenship to appoint a Board of Inquiry with respect to Ms. Lampman's Complaint.

It will be recalled that it was Mr. Smith's evidence that he had been lulled into a false sense of security by the absence of communication from the Commission and, after the passage of a lengthy period of time, had destroyed his notes concerning this matter. If Mr. Smith did indeed act in this way, there is no basis for his suggestion that the manner in which the investigation was conducted by the Commission led him to reasonably do so. The investigation proceeded along at a reasonable pace. Mr. Smith was advised at relatively frequent intervals as to the progress of the matter. He had no reasonable basis for assuming that the Complaint had been abandoned by the Commission at any stage in the investigation. I am satisfied, therefore, that no unreasonable

delay in the investigation occurred and, further, that the Commission did not act in a way which led Mr. Smith to reasonably assume that the matter had been abandoned.

Mr. Smith further argued that delay had given rise to severe prejudice to his ability to respond effectively to the allegations made in the Complaint. Apart from the alleged destruction of notes, Mr. Smith relied upon the fact that his mother-in-law had died and that he was therefore deprived of the ability to produce certain critical evidence concerning a conversation between his mother-in-law and Ms. Lampman's mother in January of 1989 concerning Ms. Lampman's intention to quit her job with Photoflair Ltd. in order to attend university. In Mr. Smith's view, this evidence would help to show that Ms. Lampman left her employment for her own reasons and trumped up charges of sexual harassment only to provide an appropriate basis for obtaining unemployment insurance for a period of time. This claim of prejudice, of course, was being raised by Mr. Smith at the outset of this proceeding. It was then my view that the reasons for Ms. Lampman's decision to terminate her employment were not likely to be a central issue in this case and accordingly, I did not consider Mr. Smith's difficulty in this regard to be a matter of significant prejudice. Mr. Smith also argued that the memories of witnesses concerning these events would have faded in the intervening period of time. Again, it was my impression that this did not constitute significant prejudice, especially as the matters in dispute

appeared to relate essentially to differing interpretations of various interactions that took place between Ms. Lampman and Mr. Smith in the absence of witnesses. Accordingly, it was my conclusion, when called upon to rule on Mr. Smith's preliminary objection, that he had not established a significant degree of prejudice resulting from the passage of time. For the foregoing reasons, then, I dismissed Mr. Smith's preliminary objection. In retrospect, it may now be added that it became apparent in the course of this proceeding that Mr. Smith had not, in fact, suffered any unusual degree of prejudice in his ability to present his case as a result of the passage of time.

III. The Facts of the Present Case

The Complaint giving rise to the present inquiry sets out a series of allegations concerning the conduct of the respondent Smith during the period from January 7th, 1988 to February 24th, 1989. During this period, the complainant Lampman served as an employee of the respondent Photoflair Ltd. Mr. Smith is the president and sole owner of Photoflair Ltd. Evidence in the form of oral testimony concerning these matters was presented almost exclusively by Ms. Lampman. Evidence concerning Ms. Lampman's reaction to some of these alleged incidents was provided by a friend of hers, Mr. Rich Wands, who also served for a brief period in late 1988 as an employee of Photoflair Ltd. Ms. Lampman's mother provided evidence concerning a conversation which she had with Mr. Smith's mother-in-law concerning the possibility of Ms.

Lampman entering university. This conversation took place in January of 1989. As well, of course, several documents of various kinds were filed in evidence in support of various factual propositions asserted on behalf of the Complainant. It is important to note, however, that Mr. Smith did not himself testify in this proceeding. Although, as has been indicated, Mr. Smith chose not to be represented by counsel during this proceeding, he was present during the entire proceeding and participated vigorously in the presentation of a preliminary objection, in examining and cross-examining witnesses and in making a final summation. The only witness called by Mr. Smith was Mr. Gary Fliss, who was, for much of the period, the only other employee, apart from Ms. Lampman and Mr. Smith, of Photoflair Ltd. Although Mr. Fliss' evidence provided an account of a few of the incidents which was somewhat sympathetic to Mr. Smith's position, Mr. Fliss' evidence did not significantly undermine the evidence presented by Mr. Lampman. Thus, very little evidence was led by Mr. Smith in direct refutation of the evidence of Ms. Lampman.

Some indication of Mr. Smith's "version" of the story, as it were, is indicated in the documentary evidence filed in this proceeding. Thus, Exhibit 2 is a photocopy of "a Respondent Questionnaire" prepared for the Commission, apparently, by Mr. Smith, which sets out his version of the facts. Further, Exhibit 3G contains what appears to be a copy of Mr. Smith's response to the investigation report prepared by the Commission concerning Ms.

Lampman's Complaint. Further, Mr. Smith was, presumably because his lack of professional legal training, inclined to sprinkle his submissions with respect to the preliminary objection, his questions to witnesses and his comments in final summation with assertions of his own accounts of the matters under discussion. These interventions, of course, do not constitute evidence before this Board of Inquiry. At no time did Mr. Smith take the witness stand, offer evidence under oath, and subject himself to cross-examination by Counsel for the Commission. Thus, for the most part, this Board of Inquiry is left with the uncontradicted testimony of Ms. Lampman as the principal source of non-hearsay evidence concerning the matters in dispute between the parties.

To the extent that the other sources referred to above offer an indication of what Mr. Smith's evidence might have been, had he chosen to give it, it should be noted that it is in many respects the case that his version of these incidents is very similar to that offered by Ms. Lampman. As will be noted below, however, there are one or two points on which Mr. Smith has indicated in his written replies to the Commission, or in his submissions in this proceeding that he either denies the occurrence of the incident in question or that he would have provided a somewhat different version of an incident which he, more generally, would have agreed did occur in some fashion. Although some reference will be made, in what follows, to Mr. Smith's version of the facts, it is important to emphasize that Mr. Smith has not led direct evidence

in support of his version of various matters in dispute.

Counsel for the Commission has argued that the failure of Mr. Smith to testify should give rise to the application of the well-known presumption that the effect of a failure to call a witness or party to give evidence which it was in the power of the party or witness to give and which would have been of assistance to the tribunal justifies the making of an inference that the evidence of the party or witness would have been unfavourable. See, generally, J. Sopinka and S.N. Lederman, The Law of Evidence in Civil Cases (1974) at pages 535-537. There is much force in this submission. It should also be noted, however, that Ms. Lampman herself was, in my view, a credible witness. Although there were one or two inconsistencies in her evidence concerning particular incidents, the main features of her evidence were not undermined in any significant way by Mr. Smith's cross-examination. Moreover, she gave the impression of being an honest person who was troubled by the treatment she had received from Mr. Smith during her time as an employee at Photoflair Ltd. For these various reasons then, I have come to the conclusion that in instances where Mr. Smith, in his submissions, has indicated that he denies that certain incidents occurred or denies that they occurred more or less in the manner recounted by Ms. Lampman in her oral testimony, it is appropriate to find, as a matter of fact, that the alleged incident did, in fact, occur and did occur, essentially in the manner described by Ms. Lampman in her testimony.

As has been mentioned, Ms. Lampman began her employment at Photoflair Ltd. on January 7th, 1988. At that time she was twenty years of age. Having graduated from high school with a grade 12 diploma a year before, she had been working for about a year for a laundry firm. She applied for a position at Photoflair Ltd. for two reasons. She was living with her parents and wanted to work closer to home. Secondly, she was interested in pursuing a career in photography. She was interviewed by Mr. Smith. Mr. Smith's age was not disclosed in these proceedings. He would appear to be at least two or three decades older than Ms. Lampman. In the course of that interview, Mr. Smith asked Ms. Lampman whether there were certain types of photography she would be uncomfortable with. He asked her whether, if films came in to be developed which contained nudity or something of a sexual nature, she would be able to deal with it. Ms. Lampman replied that she thought she would be able to do so. Ms. Lampman was hired and began working in the film processing side of the business. Apart from Mr. Smith, the only other permanent employee on the premises at that time was a photographer, Mr. Gary Fliss.

Ms. Lampman and Mr. Smith apparently got along rather well in the early stages of their employment relationship. There appeared to have been many opportunities for conversation and it is evident that their conversation ranged over a variety of both personal and professional matters. The first alleged act of sexual harassment

occurred within the first three months of Ms. Lampman's employment. It was apparently part of Mr. Smith's business, or at least an avocation of his, to photograph nude women. The photography of nude figures, it seems, was a subject of considerable interest to Mr. Smith. Mr. Smith alleges that this interest was shared by Ms. Lampman and, indeed, it was Ms. Lampman's evidence that on one occasion she brought in a number of magazines containing pictures of this kind for the purpose of showing them to and discussing them with Mr. Smith. On that occasion, Mr. Smith indicated that he would like to take these kinds of photographs with Ms. Lampman as the model and asked her if she would be willing to do so. Ms. Lampman replied that she didn't think she would feel comfortable doing so and that she would prefer that Mr. Smith hire a model and allow Ms. Lampman to work with him "behind the cameras".

Ms. Lampman was not terribly surprised by this invitation for two reasons. Mr. Fliss had warned her that such an overture might be made. Further, Mr. Smith had prepared the ground for such an invitation, on an earlier occasion, by telling Ms. Lampman about an incident involving a previous employee. The employee in question had agreed to do some nude modelling for Mr. Smith. When confronted by the employee's outraged father, Mr. Smith showed him the photographs in question and, according to Smith, the father was relieved to discover that the pictures were "not that risque". Smith advised Lampman that there was a possibility that he might invite Lampman to similarly pose for him in the future.

On neither of these two occasions did Ms. Lampman clearly indicate either that she was offended by the suggestion or that she would not in any circumstance consider complying with such a request. Thus, when Mr. Smith told Ms. Lampman the story of the previous employee, Ms. Lampman described her reply as one in which she "acknowledged that he might ask me in the future". By this, Ms. Lampman appeared to mean not that she might be willing to do so in the future but that she was aware that this request might be made. On cross-examination, Ms. Lampman conceded that when Mr. Smith directly asked her whether she would be willing to pose for him that she had "possibly" indicated that she might be willing to do so on a future occasion.

Some months later, possibly in the early summer of 1988, Mr. Smith repeated his request to Ms. Lampman that she pose for him. The circumstances surrounding this invitation were the subject of some controversy and somewhat conflicting accounts were offered by Ms. Lampman and Mr. Fliss. Yet another account is to be found in the various submissions of Mr. Smith. No point would be served by reviewing the details of this controversy. I am satisfied that what essentially occurred was that Ms. Lampman, in order to pursue her photographic interests after hours, asked to borrow some of Mr. Smith's equipment. Mr. Smith replied that he would do so if Ms. Lampman would be willing to pose for him. Again, Ms. Lampman declined this overture.

A further attempt was made by Mr. Smith to involve Ms. Lampman in posing for photographs. It was apparently Mr. Smith's practice to ask Ms. Lampman to pose from time to time, fully clothed, with colour charts or other objects in order to test film. Ms. Lampman took no exception to this practice. On one occasion, however, Mr. Smith invited Ms. Lampman into the studio room where he had the camera and lights set up. He explained that he would teach her about "form and shadow" and asked Ms. Lampman to put her hand on the table. She did so and he took some pictures. He then asked her to get up on the table on her stomach. Ms. Lampman testified that this caught her off guard and that she did so. She felt that if she refused it would become a "big deal". Mr. Smith then took some pictures of the back of Ms. Lampman's exposed legs. Although she felt that this was inappropriate behaviour on Smith's part, Ms. Lampman testified that she was not deeply upset by this episode. She did not indicate to Smith at the time how she felt about this imposition.

In his submissions, Mr. Smith sought to justify these various attempts to involve Ms. Lampman in modelling or posing for pictures as a natural outgrowth of their common interest in a particular type of photography or as an exercise in cost efficiency. Models are, according to Mr. Smith, expensive to hire. A more suspicious observer might suspect that Mr. Smith was exploiting this common interest in a particular type of photography as a device for

creating an atmosphere in which a relationship of greater intimacy might develop. There is no need to speculate as to whether Mr. Smith's interests in Ms. Lampman extended beyond the professional, however, as it would appear that two direct attempts to develop a sexual relationship with her were made by him.

In her Complaint, Ms. Lampman indicated that the first of these incidents occurred in or about the month of May, 1988. Ms. Lampman and Mr. Smith were discussing what they had done the previous weekend. Ms. Lampman and a friend had watched the movie "9 and 1/2 weeks". Mr. Smith, according to Ms. Lampman, turned the conversation around in such a way as to use it as a basis for explaining to Ms. Lampman that he had had a sexual relationship of a kind with a previous employee and that he would be pleased to have a similar relationship with her. The approach was couched in terms of attempted subtlety by referring to "the accommodation of each other's needs". No point would be served in spelling out Mr. Smith's overture in greater detail. Notwithstanding the use of somewhat ambiguous language, I find that on this occasion, Mr. Smith made a direct overture to Ms. Lampman to establish a relationship of sexual intimacy with him. Ms. Lampman testified that her reaction on that occasion was to feel "awful, nauseous, extremely uncomfortable, shocked" and so on. Her reaction was a most understandable one. Mr. Smith, it should be added, denies that he made an overture of this kind. As explained, previously, however, Ms. Lampman's evidence is to be preferred on points of

conflict such as this.

The second direct approach occurred in late September of 1988. In the course of a conversation with Ms. Lampman, Mr. Smith indicated that he had available to him a video copy of a certain pornographic movie which depicted a scene that he thought might be of interest to Ms. Lampman. He said he would bring it in to the office and show it to her. On cross-examination Ms. Lampman conceded that she did not tell Mr. Smith to refrain from doing so or indicate to him that she thought it was inappropriate. Subsequently, Mr. Smith brought the video and related video equipment into the office. He and Ms. Lampman were alone in the office on this occasion. Mr. Smith locked the front door of the Photoflair premises and shut off the lights so that potential customers would think that the facility was closed. He shut off the lights in the office he shared with Ms. Lampman and began to show the scene in question on the TV monitor. As he did so, he stood behind Ms. Lampman and after a short while began massaging her shoulders. Ms. Lampman explained that she sat motionless for a short time thinking about what to do and then leaned forward. Ms. Smith withdrew. Ms. Lampman did not turn off the equipment, as she explained, because it was not her equipment. Mr. Smith, after a while, indicated that it would be acceptable to him if Ms. Lampman wished to leave work for the rest of the day. Ms. Lampman indicated that she would like to do so and called her friend Mr. Wands to come and get her. Mr. Wands indicated in his testimony

that he received such a call and came to the Photoflair premises in response. Ms. Lampman explained what had happened and replayed the scene on the TV monitor for Mr. Wands. Mr. Wands testified that on this occasion, Ms. Lampman was "very unnerved" and "very upset" by the incident.

In his submissions, Mr. Smith concedes that this episode occurred, more or less as it was described by Ms. Lampman. He concedes that it was a gross error of judgment but emphasizes that he withdrew once he realized that his attentions were unwelcome. Moreover, he argued that Ms. Lampman's interest in watching the video segment is manifest in her failure to turn off the machine, notwithstanding her evident ability to operate the equipment in the presence of Mr. Wands. These submissions are of no assistance to Mr. Smith. There are no doubt other possible explanations for Ms. Lampman's failure to turn off the video machine, such as the possibility of her simply being stunned into inaction by the situation in which she found herself. More importantly, regardless of whether or not Ms. Lampman had any interest in watching the video, there is nothing in the evidence of Ms. Lampman or, indeed, the submissions made by Mr. Smith that would have reasonably led Mr. Smith to believe that a sexual advance or overture of this kind was anything other than most unwelcome and most inappropriate.

Other aspects of Mr. Smith's behaviour were referred to in Ms. Lampman's Complaint as instances of sexual harassment. Thus, Ms.

Lampman complained about unnecessary touching "in a sexual manner". The principal illustration of this was the fact that it was Mr. Smith's practice to place his hands on Ms. Lampman's hips whenever he wished to move behind her. This occurred principally at the front counter of the shop, though it apparently occurred with much less frequency in other locations in the facility. Ms. Lampman conceded that the space was a bit narrow at the counter but observed that Mr. Fliss was able to move around her without touching her. Further, she noted that it would have been possible for Mr. Smith to ask her to move out of the way in such circumstances. Ms. Lampman further indicated that she complained to Mr. Smith about this practice, probably in May of 1988, but that he continued to act in this manner. Mr. Smith indicated in his written reply to the Commission that he indicated to Ms. Lampman that he thought this was a "silly" concern on her part but that he would try not to "encroach on her space". On the other hand, he indicated to her that this is the sort of fellow that he is - gregarious, inclined to extend a congratulatory arm around the shoulder or touch people as he moves around them.

Ms. Lampman complained of a further incident of unnecessary touching in circumstances where Mr. Smith pulled on a sweatshirt she was wearing in order to read the writing on the shirt. In her testimony, Ms. Lampman stated that in the course of this exercise Mr. Smith brushed his hands against her genital area. Mr. Fliss, who witnessed the incident, indicated that he did not think it

would have been possible for Mr. Smith to have done so, given the location of his hands on the sweatshirt. While it may be that any actual touching of Ms. Lampman's body was accidental in this case, there is no doubt that Mr. Smith did grab at Ms. Lampman's sweatshirt and pull it out in a manner that she found offensive. It should not have been surprising to Mr. Smith, given her stated reaction to his placing of his hands on her hips, that she would find it to be so.

In the context of the investigation of a Complaint brought against Mr. Smith by another former employee, Ms. Lampman was interviewed and asked about her relationship with Mr. Smith. The notes from that interview were filed as Exhibit 8 in these proceedings. They are dated April 22, 1988. Ms. Lampman was asked about unnecessary touching and she indicated that although touching of this kind was occurring, she didn't think it was done in a "sexual way". In her testimony in the present proceeding, Ms. Lampman indicated that although that was her initial view, when she later considered the touching issue in the context of all the other things that happened between herself and Mr. Smith, she began to feel that this unnecessary touching was part of a larger pattern of conduct which had a sexual aspect to it.

The only other incident referred to in the Complaint and in Ms. Lampman's testimony occurred in the fall of 1988. Some flowers were delivered to Ms. Lampman at the office. Mr. Smith and Mr.

Fliss were present and Mr. Smith remarked that "somebody must have gotten laid". Ms. Lampman testified to the effect that she felt offended by the comment as it was a comment making assumptions about her personal life and making a joke of it at her expense.

In response to these allegations, Mr. Smith led evidence through Mr. Fliss concerning the relaxed and informal nature of the working atmosphere at Photoflair Ltd.. Though, as will be seen, I am not persuaded that this finding is of assistance to Mr. Smith, I have no difficulty in finding that such an atmosphere was, indeed, created by Mr. Smith. Mr. Smith also sought to draw support from what he viewed as the psychological nature of Ms. Lampman. As she herself noted in her evidence she was, during this period, going through a difficult time. Her parents separated. Ms. Lampman sought counselling and attended a support group for reasons not much discussed in her testimony. Mr. Smith also alleged that Ms. Lampman is a "vengeful" person and attempted to adduce evidence in support of that proposition in his cross-examination of Mr. Wands. Mr. Wands conceded that he had used this term in a previous conversation with Mr. Smith in describing an argument he had with Ms. Lampman. I am not persuaded, however, that the evidence led in this proceeding can support a finding concerning Ms. Lampman's psychological state during the period in question that would be of any assistance to Mr. Smith. In giving her testimony, Ms. Lampman did not create the impression of being a psychologically fragile person. Very little evidence was offered

with respect to the reasons for and the nature of any counselling received during this period. None of this evidence has the effect of undermining to any degree my finding that Ms. Lampman was a credible witness. It may be noted that if Ms. Lampman was indeed in a psychologically fragile state during this period, this would not place the respondent's admitted conduct in a more favourable light.

Mr. Smith further submitted that the circumstances of Ms. Lampman's departure from Photoflair in February of 1989 were material in two respects. First, it was Mr. Smith's submission that Ms. Lampman had hidden from him her intention to enter university in May of 1989. It was his view that this fact came to light inadvertently in January of 1989 in a conversation between Ms. Lampman's mother and Mr. Smith's mother-in-law. When this alleged fact was reported to Mr. Smith, Ms. Lampman had been "discovered in a lie". Mr. Smith criticized her with respect to this deception. Mr. Smith claims that this explains, in part at least, Ms. Lampman's vengeful and false characterization of the incidents referred to in her Complaint. Secondly, Mr. Smith has suggested that Ms. Lampman's allegations of sexual harassment arise from her need to justify the termination of her employment with Photoflair on February 24th, 1989 to the unemployment insurance authorities. Mr. Smith alleges that Ms. Lampman resigned at the end of February, having been accepted for admission at the University of Guelph in May, 1989, simply in order to have some

weeks off before entering university. When confronted by the need to justify her termination in order to obtain unemployment insurance, Mr. Smith argues, Ms. Lampman fabricated a sexual harassment claim against him. If this suggestion were found to have validity, this would be a relevant finding in two respects. First, it might tend to undermine the credibility of Ms. Lampman's testimony. Secondly, it might led to the conclusion that the reasons for Ms. Lampman's resignation were unrelated to alleged problems of sexual harassment and accordingly, a causal link between the alleged harassment and loss of income sustained by Ms. Lampman from February 24th, to the beginning of May, 1989 may not exist. It is necessary, therefore, to consider the evidence concerning the circumstances of Ms. Lampman's resignation in greater detail.

The fact that Ms. Lampman was thinking about or hoping to enter university was indeed disclosed in a conversation between her mother, Ruth Lampman, and Mr. Smith's mother-in-law in January of 1989. Ruth Lampman testified with respect to this conversation and indicated that she disclosed to Mr. Smith's mother-in-law, from whom she was hoping to rent an apartment, the fact that she would need only a one bedroom apartment because her daughter was "thinking of" going to university. Ms. Lampman testified that she had indeed formulated a desire to enter university at an earlier stage and had unsuccessfully applied for admission to the University of Guelph. Her application was unsuccessful because she

was not yet 21 years of age. She reapplied in time for a May, 1989 admission but by January of 1989 had not yet learned whether or not her application had enjoyed success. Thus, it appears very likely indeed that Mrs. Lampman's account of this conversation in which she suggested that her daughter was merely "thinking of" going to university is accurate.

In her testimony, Ms. Lampman stated that she made her decision to resign from Photoflair before she had received notification of the success of her application from the university of Guelph. Indeed, the evidence led in this proceeding establishes that Ms. Lampman gave Mr. Smith notice on Wednesday, February 15, 1989 that she would leave her employment with Photoflair Ltd. on the Friday of the following week, February 24th, 1989. The letter of acceptance from the University of Guelph to Ms. Lampman was filed as Exhibit 10 and is dated February 22, 1989. No doubt, Mr. Smith is suspicious that this letter is dated so shortly after he received such notice from Ms. Lampman. I am satisfied, however, that Ms. Lampman did indeed resign prior to notification of the success of her application for admission to the University of Guelph.

Even if it were the case that Ms. Lampman resigned only after having become aware that she would attend university in May, I am satisfied that the problematic nature of her relationship with Mr. Smith formed the major part of the explanation for the fact that

she terminated her employment in February rather than working through March and April. Ms. Lampman did make various attempts to obtain employment during those months. To be sure, she would be obliged to make such efforts in order to obtain unemployment insurance benefits. Mr. Smith suggests, in effect, that Ms. Lampman was engaged in an exercise of attempting to secure unemployment insurance benefits when she was not properly entitled to them. There is no basis led in the evidence led in this proceeding to support such a finding.

In summary, I am satisfied that Ms. Lampman made her decision to resign and served notice of her intention to do so prior to learning that she had been accepted for admission by the University of Guelph. Further, I am persuaded that her decision to resign was motivated, at least in part and perhaps exclusively, by reason of the fact that she had come to the conclusion that she should not be obliged to tolerate what she viewed as the problematic aspects of her relationship with Mr. Smith.

IV. Findings with Respect to Liability

The legal framework set out in the Ontario Human Rights Code, applicable to Ms. Lampman's Complaint, may be stated fairly briefly. The general right of non-discrimination on the basis of sex is set out in the following terms in section 4(1) of the Code:

> 4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family

status or handicap."

The first of two provisions of the Code dealing explicitly with sexual harassment as a phenomenon is found in section 6(2) of the Code in the following terms:

> 6(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee."

The concept of harassment is defined in the following manner in section 9(f) of the Code:

> 9(f) "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome"

It should be emphasized that the definition of harassment does not require that the "vexatious comment or conduct" have a sexual nature to it in the sense that it refers to matters of sexual intimacy. Although it may be very likely that the type of comment or conduct that will come under the scrutiny of this section does involve in some fashion the sexuality of female employees, harassment visited on female employees need not contain such an aspect in order to be covered by section 6(2).

What are often referred to as the classic or more heinous forms of sexual harassment are treated separately in section 6(3) of the Code in the following terms:

> 6(3) Every person has a right to be free from,
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making

> the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
>
> (b) a reprisal or a threat of a reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

Again, in the present context, it will be useful to stress that it is not necessary for a sexual "solicitation or advance" made by a person in authority be coupled with a threat of reprisal. Under section 6(3)(a), it is sufficient to engage this provision if the person in authority who makes the solicitation or advance "knows or ought reasonably to know that it is unwelcome". The use of a reprisal or threat of a reprisal for the rejection of such an advance or solicitation is explicitly and separately set out in section 6(3)(b).

Sections 4 and 6 are drafted in terms of employee entitlements. Section 8 of the Code then creates the prohibition against conduct infringing those entitlements in the following terms:

> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

There is no suggestion in the present case that Mr. Smith contravened section 6(3)(b) of the Code by using reprisals or threats of reprisals for the rejection of a sexual solicitation or advance. Rather, it is suggested by Counsel for the Commission that the various alleged incidents of sexual "harassment"

constitute breaches of either section 6(2) of the Code by constituting harassment in the requisite sense or by constituting sexual solicitations or advances covered by section 6(3)(a).

On the basis of the findings of fact set out above, it is clearly established, in my view, that Mr. Smith committed two breaches of section 6(3)(a) of the Code. Mr. Smith as president and owner of Photoflair Ltd. was clearly a "person in a position to confer, grant or deny a benefit or advancement" to Ms. Lampman. The conversation in which Mr. Smith discussed his relationship with a previous employee and suggested that he would like to have a similar relationship with Ms. Lampman clearly constituted a "sexual solicitation or advance". So too, did the incident in which Mr. Smith began massaging Ms. Lampman's neck while showing her a segment of a pornographic film. There is no basis whatsoever in the evidence before this Board of Inquiry for concluding other than that Mr. Smith either knew or ought reasonably to have known that these solicitations and advances were "unwelcome". Even if, as Mr. Smith alleges in his submissions, Ms. Lampman consented to or acquiesced in the showing of the videotape, this does not provide Mr. Smith with a basis for a reasonable belief that a sexual advance would be welcome.

The question which arises with respect to the other incidents, the unnecessary touching, the requests to pose for topless or nude photographs and the "flowers joke" is whether all or any of these

incidents, either singly or in combination, constitute sexual harassment within the meaning of section 6(2) of the Code. It must be asked, then, whether singly or in combination these incidents might constitute conduct which is properly characterized as "engaging in a course of vexatious comment or conduct that is known or ought reasonably known to be unwelcome".

Three elements in this statutory definition of "harassment" must be satisfied. The conduct complained of must constitute a "course" of "comment or conduct". Secondly, the conduct must be "vexatious". Finally, the perpetrator must know or "ought reasonably" to have known that the conduct was "unwelcome". We consider each element in turn. With respect to the first element, Counsel for the Commission frankly conceded that one or another of these incidents, such as the "sweatshirt pulling" episode, if considered in isolation, might not constitute a "course of vexatious comment or conduct". Rather, it is her position that when all of these incidents are considered together, all of them fit comfortably within that definition. This line of analysis raises the somewhat difficult question of the extent to which a series of isolated incidents can be combined appropriately so as to be considered to constitute "engaging in a course of vexatious comment or conduct". Without attempting a comprehensive analysis of this issue, a number of rather straightforward propositions appear relevant to the case at hand. Certainly, repetitive conduct would seem clearly to constitute a "course of conduct". Further,

it appears obvious that a series of actions, though perhaps dissimilar in some sense, occurring on different occasions which are similarly motivated, as where they constitute a sustained attempt by the perpetrator to accomplish a particular objective, would appear to be properly characterized as a "course of conduct". Further, a series of similar incidents which involve conduct which is offensive for similar reasons would appear to constitute a "course of conduct" in the requisite sense.

The various incidents complained of by Ms. Lampman appear to constitute "courses of conduct" in these various ways. Mr. Smith made a series of attempts to involve Ms. Lampman in modelling for him. He persisted in touching her, notwithstanding her explicit objection, in a manner that she found offensive. Having declared her discomfort with Smith's touching of her hips, it is not surprising that she also experienced discomfort during the sweatshirt incident.

Secondly, it must be considered, of course, whether these various courses of conduct were "vexatious" in the requisite sense. It is not necessary for the present purposes to attempt a comprehensive definition of the concept of vexatiousness in the context of the sexual harassment provisions of the Code. It is sufficient to note that where a female employee has indicated that she is made uncomfortable by the phenomenon of her supervisor placing his hands on her hips in an unnecessary fashion,

continuation of this practice is likely to upset the employee and when continued in disregard of the employee's objections, is vexatious in the requisite sense. Although Mr. Smith might object that his continuation of the practice was merely accidental, it is my view that in his response to Ms. Lampman's objection he indicated that he did not treat her objection very seriously and would not make strenuous efforts to avoid offending her in this way. I am satisfied, therefore, that at least some of the episodes of unnecessary touching were vexatious in the requisite sense. Similarly, a series of attempts to involve a young female employee, who has been hired to develop films, to pose nude or topless for her employer is conduct which is very likely to be found offensive and beyond the range of normal interaction of employer and employee in this context. It is much less obvious, perhaps, in light of the wide- ranging conversations that Mr. Smith and Ms. Lampman appear to have had on a rather frequent basis that the "flowers joke" meets this requirement.

Thirdly, it must be considered whether Mr. Smith knew or ought reasonably to have known that his conduct, in these various incidents, was unwelcome. Again, Ms. Lampman clearly made her views known with respect to the unnecessary touching. With respect to the requests for posing, however, Mr. Smith argues that Ms. Lampman never made it clear to him that she would refuse such overtures in the future. It is my view that an individual in Ms. Lampman's position does not have to meet a threshold requirement

of that kind in order to establish that Mr. Smith ought reasonably to have known that this type of request was unwelcome. The fact that someone is willing to work as a developer in a photography shop where there may be a requirement to develop photographs of nudes, or the fact that a female employee apparently voluntarily engages in conversations about photography of nudes is not a reasonable basis for thinking that the individual would not find unwelcome a request by her employer to pose in the nude or topless. Indeed, the general course of Mr. Smith's conduct appears to have involved a sustained attempt to gradually acclimatize Ms. Lampman to this possibility so that, notwithstanding her initial reservations, she might ultimately be willing to do as he requested. If he did not know, Mr. Smith should have appreciated that overtures of this kind were unwelcome.

In summary, then, I have come to the conclusion that the facts of the present case establish a number of contraventions of both section 6(2) and section 6(3)(a). Apart from Mr. Smith's attempt to undermine the credibility of Ms. Lampman's evidence concerning these events - an attempt which, for reasons set out above, I have found unsuccessful - Mr. Smith sought to defend at least some of the allegations made by Ms. Lampman on the basis of the informal nature of the working environment and his own gregarious personality. Mr. Smith's submissions on this point were confirmed, to some extent, in the evidence of Mr. Fliss. The working environment was said to be a friendly and unstructured one. There

was said to be "no normally defined boss-subordinate relationship". People could say what they liked without fear of disfavour, and so on. Mr. Fliss did not provide evidence to the effect that Mr. Smith is a gregarious "arm around the shoulder" type of person. I am willing to assume, however, for the sake of argument, that this may well be the case. The important point for present purposes is that neither an informal working environment nor a gregarious nature on the part of the part of the "person in a position to confer, grant or deny a benefit or advancement" to the complaining employee offers a defence to an allegation of sexual harassment. The Code's protection of a female employee's right to be free of sexual advances or solicitations from their superiors is available whether or not the workplace environment is an informal or friendly one and whether or not the superior in question views the relationship as a non-hierarchical one. The relationship is, both in fact and in law, hierarchical and female employees are entitled to be free from being placed in the awkward position of having to deal with such overtures from male employees who, for example, have the power to determine their wages or indeed, dismiss them.

Similarly, an affable and gregarious nature is not, per se, a defence to a sexual harassment claim. Mr. Smith appeared to think that this personality trait be of assistance to him in either one of two ways. First, it might tend to show a lack of intention or mendacity on his part, at least in the context of the

allegations of unnecessary touching. Secondly, it might demonstrate that he treated everyone this way and thus was not discriminating on the basis of sex. With respect to the first point, it has already been indicated above that it is not necessary to establish a subjective intention to discriminate. As I have already indicated, Mr. Smith either knew or should have known that his actions were unwelcome. Mr. Smith did not explicitly argue that his actions or some of then were involuntary. Even is some unnecessary touching could be explained on this basis however, I am satisfied that not all of it could be. When spoken to on this subject by Ms. Lampman, Mr. Smith seemed quite indifferent to her concerns in this regard.

Mr. Smith's second point, apparently, is that as a result of his gregarious nature he treated other employees in the same manner. Thus, he would move Mr. Fliss out of his way in the same manner as he moved Ms. Lampman. It is the sort of person he is. As he treats all employees equally, in this regard, there is arguably no harassment "because of sex" as is required by section 6(2). The short answer to this submission is that the "same" conduct may have a differential impact on male and female employees. It is one thing for a male superior or employer to place his hands on the hips of a male employee, it may quite another to visit the same conduct on female employees. In the present case, of course, the fact that Ms. Lampman complained to Mr. Smith about his conduct in this regard puts this matter to

rest. That protest, in my view, clearly establishes the differential quality of the impact and renders Mr. Smith vulnerable to an allegation of sexual harassment.

V. Remedies

A series of contraventions of the Code having occurred in the present case, we must turn to the question of fashioning an appropriate remedy. The remedial provisions of the Code applicable to the present case are set out in the following terms in section 40(1).

> 40.- (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,
>
> (a) direct the party to do anything that, in the opinion of the board, that party ought to do to achieve compliance with this Act, both in respect of the complainant and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

Sub-paragraph (b) enables a Board of Inquiry to award restitution, including monetary compensation. Sub-paragraph (a) enables a Board to order a party to do anything (presumably other than making restitution including monetary compensation) that the party ought to do in order to achieve compliance with the Act. Orders of this

second kind may deal not only with past practice but with future practice. Co-counsel for the Commission has argued that it would be appropriate in the present case to exercise the remedial powers under both of these sub-paragraphs. With respect to (a) it was submitted that the respondent parties should be required to cease and desist engaging in practices of sexual harassment, should be required to post notices concerning the applicability of the provisions of the Code in the workplace of Photoflair Ltd. and should be subject to monitoring by the Ontario Human Rights Commission for a period of two years. Under sub-paragraph (b) it was submitted that the respondent parties should be obliged to pay compensation in the amount of $2,677.50, together with interest, representing lost wages from the date of Ms. Lampman's termination of employment at Photoflair Ltd. until her enrolment in university at the beginning of May. As well, it was argued that the respondent party should be obliged to pay $3,000.00 in what was referred to as "general damages".

As a preliminary point, I note that such orders as are appropriate may be made against both the respondent Smith and the respondent Photoflair Ltd. Mr. Smith's personal liability, as the individual who engaged in acts which contravened the Code is clearly established in section 8. The liability of Photoflair Ltd., however, is not directly established by the Code. Indeed, although section 44(1) specifically provides for the vicarious liability of employers for contraventions of the Code committed by

their officers and employees, that provision explicitly provides that it does not apply to contraventions of section 4(2) and 6. It does not follow, however, that Photoflair Ltd. is exempt from liability for the actions of Mr. Smith. Indeed, it is well established in the case law concerning this point that principles of common law corporate liability apply in situations of this kind with the effect of rendering a corporate respondent, such as Photoflair Ltd., directly liable for the actions of a person such as Mr. Smith who is the corporation's president and sole owner. At common law, the conduct of an officer such as Mr. Smith is said to be the conduct of a "directing mind" of the corporation and therefore is considered to be conduct of the corporation itself. Hence, section 44 of the Code which deals with the question of vicarious or indirect liability is inapplicable in such circumstances. Previous decisions in which these propositions have been adopted include: Green v. Safieh (1988), 9 C.H.R.R. D/4749 (Ont. B.I.); Persaud v. Consumers Distributing Ltd. (1991), 14 C.H.R.R. D/23 (Ont. B.I.); Shaw v. Levac Supply Ltd. (1991), 14 C.H.R.R. D/36 (Ont. B.I.). Accordingly, it is appropriate in the present case that such remedies as are awarded to Ms. Lampman are enforceable against both Mr. Smith and Photoflair Ltd.

Special Damages

With respect to the question of damages for lost wages, the actual amount of lost wages claimed appears to be uncontroversial. Ms. Lampman's pay stubs for the weeks ending January 6, 1989 and

February 24, 1989 were entered as Exhibit 11. Mr. Smith does not challenge the calculation put forward on Ms. Lampman's behalf of $2,677.50 as being the appropriate measure of wages lost during the relevant period. What is controversial from Mr. Smith's perspective, however, is whether the alleged incidents of sexual harassment do indeed provide the explanation for what he considers to be Ms. Lampman's resignation as of February 24, 1989. Mr. Smith indicated that it was his view that Ms. Lampman resigned simply in order to have some vacation time prior to commencing her university studies. Mr. Smith further submitted that the evidence of Ms. Lampman's attempts to obtain alternate employment following February 24th were inspired by her need to demonstrate such efforts to the unemployment insurance authorities.

As has been previously indicated, I accept Ms. Lampman's evidence that she had given notice of her intention to resign prior to receiving an acceptance of her application for admission from the University of Guelph. Further, there is no evidence before this Board of Inquiry which supports Mr. Smith's suggestion that Ms. Lampman was not genuinely attempting to obtain alternate employment during the period following February 24th. I am satisfied that Ms. Lampman's resignation was indeed a direct result of the treatment she received while employed by Mr. Smith and that this conduct, on Mr. Smith's part, constituted a series of contraventions of the Code. Thus, a causal connection between Mr. Smith's contraventions of the Code and Ms. Lampman's lost wages is,

in my view, clearly established. Moreover, in a case of this kind it is sufficient for a complainant to establish that sexual harassment was a significant factor in the termination of an employment relationship but not necessarily the sole or primary reason for its termination. See, for example, Korda v. PK and JP Enterprises Ltd. (1990), 12 C.H.R.R. D/201 (B.C.C.H.R.). On the present evidence, there cannot be any serious doubt that sexual harassment was a significant factor in Ms. Lampman's decision to terminate her employment with Photoflair Ltd.

Two further points concerning damages for lost wages must be addressed. The first relates to unemployment insurance benefits. It was mentioned in argument that Ms. Lampman did successfully apply for unemployment insurance and received unemployment insurance payments for a period of time after February 24, 1989. It may be asked, then, whether it would be appropriate to make deductions in the amount of those payments from any award of compensation made in the present proceeding. In my view, no such deduction should be made. In the context of civil proceedings, unemployment insurance benefits are understood to be a "collateral benefit" and are therefore irrelevant to the calculation of damages in claims for lost wages. See, for example, Ratych v. Bloomer (1987), 40 D.L.R. (4th) 180 (Ont. H.C.). Similarly, a respondent in a human rights proceeding ought not be able to take advantage of the complainant's receipt of a collateral benefit of this kind. The question of whether all or some portion of such payments ought

to be restored to the government is a question to be resolved under the provisions of the unemployment insurance scheme. An approach of this kind was adopted in a recent decision of an Ontario Board of Inquiry in Middleton v. Walsh (August 21, 1991, unreported).

The second point relates to interest on the $2,677.50. Under the rules of civil procedure, interest is generally awarded on damage awards in civil proceedings. As other Boards of Inquiry have noted, there does not appear to be a principled basis for treating claims under the Code in a different manner. The method for calculating interest should be that prescribed for civil proceedings by the Courts of Justice Act, R.S.O., 1990 c.C-43, as amended (secs. 127-128). Interest should be payable from the date upon which Mr. Smith received notice of the Complaint, that being established in these proceedings as August 31, 1989.

General Damages

In her submissions at the conclusion of the hearings held concerning this matter, Co-counsel for the Commission argued that an award of general damages in the amount of $3,000 should also be granted to the Complainant. In support of this claim, reliance was placed on a series of previous decisions of Boards of Inquiry established under the Code. The three decisions relied upon were: Noffke v. McClaskin Hothouse (1986), 11 C.H.R.R. D/407; Cuff v. Gypsy Restaurant (1987), 8 C.H.R.R. D/3972; and Shaw v. Levac Supply Ltd. (1991), 14 C.H.R.R. D/36.

Subsequent to the conclusion of the hearing, Counsel for the Commission made a further submission in writing enclosing a copy of the decision of the Ontario Divisional Court in York Condominium Corporation No. #216 v. Dudnik (1991), 3 O.R. (3d) 360. In passing, I should record my gratitude for counsel for bringing this authority to my attention and to that of Mr. Smith. In that case, the Divisional Court found that damages from mental distress or mental anguish can only be awarded under the concluding lines of section 40(1)(b) where the infringement has been engaged in wilfully or recklessly. In the absence of wilful or reckless conduct, general damages for "stress" could not be awarded by a Board of Inquiry as, in the Court's view, "stress" should be considered to be included within the concept of "mental anguish" for the purposes of section 40(1)(b). The Court further observed that there did not appear to be "any room in any part of s.40 for an award of punitive damages" (at p.375). In her letter, Counsel went on to suggest that this decision of the Divisional Court is not applicable to the claim for general damages being advanced on behalf of Ms. Lampman as this claim was being advanced on the basis of the opening words of section 40(1)(b) as a claim for "restitution, including monetary compensation, for loss arising out of the infringement".

If, as Counsel has argued, one assumes that Ms. Lampman's claim for general damages arises on what may be referred to as the

"first branch" of section 40(1)(b) as opposed to the mental anguish or "second branch" of 40(1)(b), the interesting question raised by the decision in the York Condominium case concerns the nature and extent of any general damages that may be available to the Complainant under the first branch of the section. In order to explore this question, it is necessary to describe the holding in the York Condominium case at somewhat greater length.

In York Condominium, the litigation arose out of a series of complaints involving several complainants concerning the operation of certain "adult only" condominiums. In a holding which was upheld by the Divisional Court, the Board of Inquiry had held that a variety of breaches of the Code in the form of discrimination on the basis of "family status" had occurred. The Board had awarded various remedies including monetary compensation in the form of general damages in various amounts to various complainants.

It is important to note that two different types of general damages had been made available by the Board of Inquiry in the York Condominium case. First, relying on an earlier decision of the same Chair, Professor Cumming, in Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170, the Board had granted awards of special damages to certain complainants because they had "suffered the loss of the right to freedom from discrimination". In the Cameron case, Professor Cumming had articulated this type of general damage, at p.D/2198, in the following terms:

> "An inherent but separate component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the Complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is itself an independent injury which a complainant suffers."

Secondly, the Board had awarded general damages of another type on the basis that certain complainants had suffered "stress" or "pressure" and that such injuries should be reflected in an award of general damages. The Board had gone on to reason that the breaches of the Code had been committed "wilfully" and that, accordingly, the Board was entitled to award damages for mental anguish under section 40(1)(b). In reaching this conclusion, the Board had concluded that the phrase "wilfully" in section 40(1)(b) means "intentionally, knowingly or deliberately". As the respondents had all acted "intentionally" in enforcing the "adult only" restrictions, the Board was of the view that they had acted wilfully within the meaning of section 40(1)(b).

The Divisional Court was critical of this finding with respect to general damages arising from "stress" on two grounds. First, it was the Court's view that "wilfully" and "intentionally" were not synonymous terms. The respondents had been said by the Board to be "dealing with an uncertain issue, involving new legislation, on the advice of Counsel, and with some support for their position through their court applications taken". In these circumstances,

the Divisional Court held, the respondents, though acting "intentionally", could not be said to be acting "wilfully" within the meaning of section 40(1)(b). The Court explained this point, at page 376, in the following terms:

> "I think what the Board said in that respect supports my conclusion that those responsible for conducting the affairs of the appellants did not have their minds directed towards discrimination against the complainants. Rather, they were completely caught up in the determination of the enforceability of the outstanding restrictions or policies."

Having found that the second branch of section 40(1)(b) was therefore unavailable as a basis for calculating damages, the Divisional Court considered whether damages for "stress" could be awarded on the basis of the first branch of section 40(1)(b). As has been indicated above, the Court's view was that no such damages could be awarded. The concept of "stress" was included within the concept of "mental anguish" set out in the second branch of section 40(1)(b). On this basis, then, the Court concluded that the awarding of general damages for "stress" by the Board was improper. It is important to note, however, that the Court went on to hold that the first type of general damages - those relating to "loss arising out of the infringement" - could properly be awarded. Accordingly, the Court found it unnecessary to disturb the actual amounts of general damages awarded to particular complainants even though those awards had included, in the Board's view at least, some component for "stress".

In summary, then, there appear to be two propositions adopted by the Divisional Court in the York Condominium case that are of potential relevance in the present context. First, the Court appears to accept that general damages of the Cameron type awarded for "loss arising out of the infringement" is appropriate. Secondly, the Court took the position that general damages for "stress" can only be awarded under section 40(1)(b) where the misconduct in question is "wilful" or "reckless" in the requisite sense. The question which appears to remain at large, however, is whether there is any room, under the first branch of section 40(1)(b), for other types of general damages. That is to say, the Court in York Condominium did not explicitly state that the only type of general damages that can be awarded under the first branch of section 40(1)(b) are for the "intrinsic value" of the infringement of the right. Thus, it may be asked whether there are some types of injuries to dignity or self respect, for example, that might not constitute "mental anguish" for the purposes of the second branch of section 40(1)(b) and might therefore sound in general damages under the first branch of the sub-section. It might well be that the correct interpretation of the general thrust of the reasoning in the York Condominium case is that the Court would be unsympathetic to the notion that there are categories of what might be referred to as psychic injuries that are not covered by the second branch of the sub-section and therefore can be the subject of unlimited awards of general damages under the first branch. If "stress" is to be included within "mental anxiety", as

the Court held, would other types of psychic injury not likely be included as well? Nonetheless, it is also true to say that this issue was not squarely raised before the Court in York Condominium and was not the subject of an explicit pronouncement.

This apparent gap in the analysis provided by the reasoning in York Condominium is relevant to the present dispute in the following manner. Counsel for the Commission indicated in her letter that the claim for general damages brought in the present case rests on the first branch of section 40(1)(b). Thus, it is not a claim for compensation for "mental anguish" under the second branch. At the same time, it was apparent from the submissions of Co-counsel at the conclusion of a hearing concerning this matter, that the claim for general damages was not simply one for the "intrinsic value" of the "loss arising out of the infringement". Indeed, it appeared from the submissions made at the hearing that the claim for general damages included some consideration of psychological injury. Thus, the three previous decisions of Boards of Inquiry relied upon, which were referred to above, were all cases in which general damages were awarded for "mental anguish". Further, reliance was placed on the following list of factors said to be relevant to the assessing of general damages by Professor Cumming in Torres v. Royalty Kitchenware Ltd. (1982), 3 C.H.R.R. D/858 at p. D/873:

(a) The nature of the harassment, that is, was it simply verbal or was it physical as well?

(b) The degree of aggressiveness and physical contact in the harassment.

(c) The ongoing nature, that is, the time period of the harassment.

(d) The frequency of the harassment.

(e) The age of the victim.

(f) The vulnerability of the victim.

(g) The psychological impact of the harassment upon the victim.

It was suggested that to some extent at least, all of these factors were present in the circumstances of the present case. A number of these factors evidently refer to aspects of psychological injury and, indeed, might be considered to be relevant to a determination as to whether or not "mental anguish" has occurred. Thus, it would appear that, to some extent at least, the claim for general damages brought in the present case falls into the "gap" in the reasoning in the York Condominium case.

The previous decisions of Boards of Inquiry relied on in the submissions of Co-Counsel do not serve to fill in this gap. The Torres case was decided on the basis of an earlier version of the Code which did not contain a provision of the kind now set forth in section 40(1)(b). It is not surprising, therefore, that the Board in Torres does not attempt to draw a distinction between "mental anguish" on the one hand and other kinds of psychological injuries on the other. The decisions in Noffke v. McClaskin

Hothouse and Cuff v. Gypsy Restaurant, referred to above, are cases in which general damages were awarded under the second branch of section 40(1)(b). This can also be said of the third case relied on by Co-counsel, Shaw v. Levac Supply Ltd., referred to above, though it is also true that in that case Professor Hubbard stated, at page D 61, that "Awards of general damages for infringements of the Code reflect not only the mental anguish which wilful or reckless conduct may cause, but elements of pain and suffering and the injury to the complainant's dignity and self-respect as well." Professor Hubbard then went on to rely on the list of factors set out in the Torres case. Thus it would appear to be Professor Hubbard's view that there exist a types of mental "pain and suffering" which are not embraced by the concept of "mental anguish" and which, presumably, can therefore be the subject of a special damages award under the first branch of section 40(1)(b).

A similar view was taken by Professor Cumming in the Cameron case, referred to above, where he suggested that general damages of various kinds, as under the Torres line of authority, were available, formerly under the old Code and now under the first branch of the new section 40(1)(b) and that the second branch of 40(1)(b) provides for what are "in effect, punitive damages" (at p. D/2199). Thus, there is some support in these two decisions for the notion that general damages for some types of mental injury (other than mental anxiety and stress) are available under the first branch of section 40(1)(b). On the other hand, of course,

neither Professor Cumming nor Professor Hubbard had enjoyed an opportunity to read the later decision of the Divisional Court in the York Condominium case. Certainly, Professor Cumming's characterization of the second branch of 40(1)(b) as one which permits the awarding of punitive damages is inconsistent with the views expressed by the Court in the York Condominium decision. Further, though the point is obviously not free from difficulty, it is not at all obvious that Professor Hubbard's views on this point are consistent with the position taken by the Court that compensation for "stress" can occur only under the second branch of section 40(1)(b).

It would be unattractive to attempt to resolve this difficulty in the present case. The point has not been fully argued in the present proceeding. Counsel for the Commission, quite understandably, did not argue the point in her covering letter. No submissions on this point were received from Mr. Smith. Nonetheless, there are, in my view, two grounds on which general damages can and should be awarded in the present case. First, it will be recalled that the Divisional Court, in York Condominium, appeared to accept the view that general damages could be awarded with respect to the "intrinsic value" of the "loss arising from the infringement". It would be appropriate to make such an award in the present case. Secondly, there was some evidence led with respect to what can reasonably be described as "mental anguish" resulting from Mr. Smith's two breaches of section 6(3)(a) of the

Act relating to sexual solicitations or advances. This conduct of Mr. Smith was, in my view, wilful and reckless. Unlike the respondents in the York Condominium case, Mr. Smith was not engaging in conduct which he reasonably believed, on the basis of legal advice, did not constitute a breach of the Code. He intentionally engaged in conduct that constituted a discriminatory act. It may well be that Mr. Smith was unaware of the fact that his conduct constituted a breach of the Code in each instance. The Divisional Court in York Condominium, however, cannot have meant that the misconduct must be "wilful" or "reckless" in the sense that the actor is aware of the fact that his conduct constitutes such a breach. Mr. Smith's conduct was both "wilful" and "reckless". Accordingly, an award of some general damages under the second branch of section 40(1)(b) is appropriate in the present case. Though the measurement of such damages is a difficult matter, I have concluded that an award of general damages in the amount of $2,000 is appropriate in all the circumstances of the present case.

Other Remedies

It is also appropriate to make certain orders under section 40(1)(a) of the Code in an attempt to achieve compliance with the Act both in respect of past and future practices. As is the normal practice in a case of this kind, the respondents should be required to post copies of the Commission's "Declaration of Management Policy" in appropriate locations in any business operation

maintained in Ontario by either of them. As well, it would be appropriate to require that brochures concerning sexual harassment made available by the Commission be placed in a location in any such operation that will serve to make them readily available to employees.

Co-Counsel for the Commission has also requested that a cease and desist order be issued. I am not satisfied, however, that such an order is either necessary or easily fashioned in the present case. If such an order were drafted in general terms to the effect that the respondents be required to "cease and desist" from engaging in acts of sexual harassment, it is not clear what purpose would be served. Mr. Smith is subject to the provisions of the Code and is under a continuing legal obligation not to engage in discriminatory practices, such as sexual harassment, whether or not such an order is issued. Moreover, it would be unattractive to attempt to fashion a cease and desist order referring to specific types of conduct that amount to sexual harassment. The drafting of such an order would prove to be difficult. Moreover, such an order might be considered, unhelpfully, to suggest that the order constituted the full extent of the respondent's legal obligations with respect to this area.

Co-Counsel for the Commission has also requested that an order subjecting the employment practices of the respondents to monitoring by the Commission for a period of two years be issued.

Such orders have been made in other cases. See for example, Morano v. Wilson Nuttall (1988), 9 C.H.R.R. D/4876. Such an order is, in my view, appropriate in the present case for two reasons. First, there was some evidence led in this proceeding, albeit heresay in nature, which tended to suggest that another previous employee or employees had somewhat similar experiences to those of Ms. Lampman during their employment with Photoflair Ltd. Secondly, it appeared from Mr. Smith's questions of witnesses and from his submissions that he does not have a clear view of the requirements imposed on employers by the sexual harassment provisions of the Code. A period of monitoring would provide an opportunity for Mr. Smith to be made more fully aware of the nature of those obligations.

VI. Order

This Board of Inquiry, having found the respondent Smith and the respondent Photoflair Ltd. to have committed certain breaches of sections 4(2) and 6(3)(a) of the Code hereby orders the following:

1. The Respondents are jointly and severely liable to pay forthwith to the Complainant as follows

   (a) as damages for lost wages the sum of $2,677.50:

   (b) interest on the said sum, calculated in accordance with the manner prescribed by the Courts of Justice Act of Ontario, such interest to be calculated on the period commencing on August 31, 1989;

   (c) as general damages, the sum of $2,000.00.

2. The Respondents shall post in any operation or business that either of them operates in Ontario, copies of the Declaration of Management Policy of the Ontario Human Rights Commission and shall make available to employees in reasonable quantities and at reasonable locations, literature or brochures prepared by the Ontario Human Rights Commission with respect to sexual harassment.

3. The Respondents shall, each time a female employee leaves the employment of either of them in the two years following this decision, deliver in writing to the Ontario Human Rights Commission the following information:

"(a) the name and address of the employee;

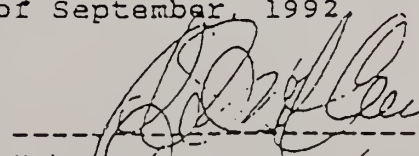
(b) the period of her employment; and

(c) her employment record including the reasons for termination.

4. The Respondents shall each allow the Ontario Human Rights Commission to monitor the employment practices of the Respondents in any operation that they maintain in Ontario for a period of two years following this decision.

This Board of Inquiry shall retain jurisdiction for the purpose of resolving any difficulties the parties might experience in implementing this Order.

Dated at Toronto this 28th day of September, 1992.



John D. McCamus
Chair, Board of Inquiry.